

86-928

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court Of The United States
October Term, 1986

EDDIE BARNARD NEAL,
Petitioner,

vs.

J. D. WHITE, WARDEN, AND
CHARLES GRADDICK, ATTORNEY GENERAL
OF THE STATE OF ALABAMA,
Respondent

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ROBERT R. KRACKE
KRACKE, THOMPSON & ELLIS
2220 Highland Avenue, South
Birmingham, Alabama 35205-2902
(205) 933-2756

Attorney for Petitioner Neal

November, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDDIE B. NEAL,)	
)	
Petitioner,)	
)	
vs.)	Case No.
)	CV 85-A-2161-S
J. D. WHITE, Warden;)	
ATTORNEY GENERAL OF)	
THE STATE OF ALABAMA,)	
)	
Respondents.)	

J U D G M E N T

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed in this action be and the same hereby is DENIED.

DONE this 30th day of Sept., 1985.

/s/ C. W. ALLGOOD

Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDDIE B. NEAL,)	
)	
Petitioner,)	
)	
vs.)	Case No.
)	CV 85-A-2161-S
J. D. WHITE, Warden;)	
ATTORNEY GENERAL OF)	
THE STATE OF ALABAMA,)	
)	
Respondents.)	

MEMORANDUM OPINION

In this petition for habeas corpus filed pursuant to 28 U.S.C. § 2254, petitioner attacks a sentence of life without parole imposed upon him in the Circuit Court of Jefferson County, Alabama after petitioner was convicted of robbery-murder.

As grounds for federal habeas relief, petitioner contends that he was deprived of a fair trial by the fact that prosecution peremptorily struck from the petit jury all potential jurors who were black. Secondly, petitioner contends that he was indicted under a law no longer in effect. Petitioner alleges that he was denied effective assistance of counsel; this allegation is based upon petitioner's contention that his counsel failed to object to the prosecution's use of peremptory challenges to strike all members of the members of the black race. Petitioner alleges that he was denied the right to cross-examination the witness whose prior testimony was read to the jury. Lastly, petitioner contends there was insufficient evidence to sustain a conviction. The criminal case involving this petitioner has a long, sad, and tragic history. Petitioner was first brought to trial in the Circuit Court of Jefferson County, Alabama in 1979 for the capital

offense of robbery during which the victim was intentionally killed. The trial jury recommended that the sentence of death be imposed upon this petitioner but the trial judge found that the mitigating factors outweighed the aggravating factors and commuted the sentence to life without parole. This conviction of petitioner was affirmed on direct appeal. *Neal v. State*, 372 So.2d 1331, *cert. denied*, 372 So.2d 1348 (1972). Subsequently, however, petitioner's conviction was reversed and remanded for a new trial on the authority of *Beck v. Alabama*, 447 U.S. 625 (1980).

Petitioner was retried and a verdict of guilty was rendered on September 13, 1982. Petitioner was again convicted of the capital offense; however, because of the prior sentence, the maximum sentence possible was life without parole. Petitioner was so sentenced. Petitioner's conviction after his retrial was affirmed by the Alabama Court of Criminal Appeals. *Neal v. State*, 460 So.2d 257, *cert. denied*, 460 So.2d 257 (1984).

Petitioner filed a petition for error coram nobis in the Circuit Court of Jefferson County, Alabama raising grounds almost identical to those asserted in this petition for habeas corpus. Relief was denied and the denial of relief was affirmed by the Alabama Court of Criminal Appeals without opinion on June 11, 1985.

The files and records of this case reflect that grounds one and two asserted by this petitioner were raised by him in his petition for writ of error coram nobis but were not raised on direct appeal. These issues were available and known to the petitioner at the time his direct appeal was perfected and his failure to assert these on direct appeal precludes reliance upon these issues in a collateral attack upon his judgment. This principle of waiver is well-established in the law of the State of Alabama and under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), a federal habeas corpus court is barred from review of these issues due to petitioner's procedural default since petitioner has satisfied neither the cause nor prejudice requirement. *See in this connection Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983).

Petitioner's attack on the performance of his attorney is equally without merit. In order for inadequate representation by counsel to be a valid basis for federal habeas relief, a petitioner must show that his counsel's performance was deficient and was so serious as to deprive the petitioner of a fair trial. In addition, petitioner is required to show that, but for the ineffective performance of his counsel, a different result would have been reached. *Strickland v. Washington*, ____ U.S. ____, 80 L.Ed.2d 674 (1984). Petitioner has utterly failed to allege any facts which would demonstrate ineffective assistance of counsel as that standard is described in *Strickland v. Washington supra*. In light of the facts of this case which are set out in detail in the opinion of the Alabama Court of Criminal Appeals in *Neal v. State*, 372 So.2d 1331, petitioner should heed the statement of the Alabama Court of Criminal Appeals as follows:

"In the light of this entire record, we think this appellant was extremely fortunate to get life imprisonment without parole. He received a fair and impartial trial and he was capably represented by counsel appointed by the court. He owes his counsel an everlasting debt of gratitude. He should not be heard to complain further about his sentence."

Petitioner's contention regarding the inability to cross-examine a witness is based upon the trial court's receipt of the testimony of a witness who was hospitalized by utilizing a transcript of the direct cross-examination of this witness in the earlier trial. This procedure was clearly justified under state law and does not present a federal constitutional question.

Petitioner's suggestion that he was prosecuted under a statute not in existence is without merit. Petitioner was originally indicted under the provisions of Title 13-11-2, *Code of Alabama*, 1975. Upon revision of the Code, Title 13-11-2 became Title 13A-5-31. Title 13A-5-31 was repealed by Acts of 1981, No. 81-178, Section 20, effective July 1, 1981. The repeal of Title 13A-5-31 "shall not affect the application of preexisting law to conduct occurring before 12:01 a.m. on July 1, 1981." The incident which gave rise to the prosecution of this petitioner

occurred in 1976. Petitioner was tried under the appropriate statute of Alabama. See commissioner's notes following Title 13A-5-31 appearing on page 116 of the Alabama Code of 1975 (1982 replacement volume).

Petitioner's last attack is on the sufficiency of the evidence. The evidence received by the trial court and considered by the Alabama Court of Criminal Appeals was more than ample to satisfy the requirements of *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979).

This petition for habeas corpus is therefore due to be denied. An appropriate judgment will be entered.

DATED this 30th day of Sept., 1985.

/s/ C. W. ALLGOOD

Senior Judge